MOTION FILED
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No. 00-201

IN THE

Supreme Court of the United States

THE NEW YORK TIMES COMPANY, INC.; NEWSDAY, INC.; THE TIME INCORPORATED MAGAZINE COMPANY; LEXIS/NEXIS AND UNIVERSITY MICROFILMS INTERNATIONAL,

Petitioners,

v.

JONATHAN TASINI; MARY KAY BLAKELY; BARBARA GARSON; MARGOT MIFFLIN; SONIA JAFFE ROBBINS; AND DAVID S. WHITFORD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION OF NORTHERN LIGHT TECHNOLOGY, INC. FOR LEAVE TO SUBMIT A BRIEF AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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14pp

MOTION OF NORTHERN LIGHT TECHNOLOGY, INC. FOR LEAVE TO SUBMIT A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

Northern Light Technology, Inc. respectfully moves this Court for leave to submit an *amicus curiae* brief, filed contemporaneously with this Motion, in connection with the instant petition for a writ of certiorari.

Movant is a privately held corporation that licenses a vast collection of journals, magazines, newswires and other sources of information from print publishers, and makes electronic copies of that material available to the public. Some of this material may contain articles written by freelance writers who have not expressly authorized the publishers to make electronic copies of their contributions to those works. Instead, those contributions have been produced under the statutory privilege that allows the publisher of a collective work to redistribute individual contributions "as part of that particular collective work, any revision of that collective work, or any later collective work in that same series." 17 U.S.C. 201(c).

Movant has a compelling interest in the continued application of this privilege to the publication of collective works on the world wide web. If the decision below were allowed to stand, print publishers may feel compelled to withdraw some or all of the material that they have made available for online distribution. As a result, Movant could lose a significant source of revenue, but more importantly, the public would lose the ability to search that material in a convenient and cost-effective manner.

The petitioners have consented to Movant's request to submit an *amicus curiae* brief in support of the petition, but the respondents have withheld their consent. Nevertheless, counsel for the respondents has stated that they will not oppose this motion provided that the Court's consideration of the proposed brief will not delay its review of the issues presented in the petition.

Movant's brief informs the Court of an important factual development that has occurred since the petitioners filed their petition, and therefore will help the Court make an informed decision concerning the impact of granting or denying the instant petition.

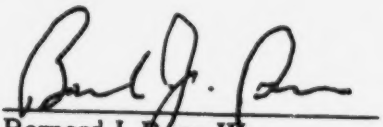
As the petitioners have observed, several organizations that represent freelance writers have threatened to sue print publishers and those who reproduce their publications in electronic copies throughout the entire country unless they comply with the Second Circuit's decision in *Tasini v. New York Times*. (Petitioner's Brief at 12-13.)

In fact, over the past eight weeks, three purported class actions have been filed in three separate jurisdictions on behalf of freelance writers nationwide. These actions raise precisely the same issues that the Second Circuit considered in *Tasini*. If this Court granted the petition and reversed the Second Circuit's decision, these purported class actions would be subject to immediate dismissal, but if this Court affirmed that decision, the other actions might well settle. Therefore, granting the petition and hearing the *Tasini* case on its merits would conserve judicial resources

and promote the expeditious determination of the claims alleged in those actions.

For the foregoing reasons, Movant respectfully submits that its Motion for Leave to Submit a Brief as *Amicus Curiae* should be granted.

Respectfully submitted,



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Dated: October 2, 2000

QUESTION PRESENTED

Is the publication and distribution of newspapers, magazines, and other periodicals in digital and other electronic formats, privileged under 17 U.S.C. § 201(c) of the Copyright Act, or does it infringe the copyrights held by contributing freelance authors?

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INTEREST OF THE *AMICUS CURIAE*[1]

Northern Light Technology, Inc. ("*Amicus*") submits this brief in support of the petition. *Amicus* is a privately held corporation that makes more than 7,100 full-text journals, books, magazines, newswires, and other information resources available electronically. *Amicus* licenses these materials from print publishers and makes them available to researchers, scholars and the general public on its website, which is located at www.northernlight.com. Some of these materials may contain articles written by freelance writers who have not expressly authorized the print publishers to make electronic copies of their contributions to those works. Therefore, those contributions have been reproduced under the statutory privilege that allows the publisher of a collective work to redistribute individual contributions "as part of that particular collective work, any revision of that collective work, or any later collective work in that same series." 17 U.S.C. 201(c).

Amicus has a direct and compelling interest in the continued application of this congressionally mandated privilege to the publication of collective works on the world wide web. If the decision below were allowed to

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1. No counsel for a party authored this brief in whole or in part, and no person other than the *Amicus Curiae* and its counsel, made a monetary contribution to the preparation and submission of this brief.

stand, print publishers may feel compelled to withdraw some or all of the newspapers, magazines and other periodicals that they have made available in electronic copies. As a result, *Amicus* could lose a significant source of revenue, but more importantly, the public would lose the ability to search those collective works in a convenient and cost-effective manner.

Accordingly, *Amicus* urges the Court to grant the writ and hear this case on its merits.

SUMMARY OF ARGUMENT

Amicus submits this brief to inform the Court of an important factual development that has occurred since the petitioners filed their appeal. Over the past eight weeks, several freelance writers have filed three purported class actions alleging copyright infringement claims on behalf of all such writers nationwide. These actions raise the same questions of law that the Second Circuit addressed in *Tasini v. New York Times*. Therefore, if this Court granted the petition and reversed the Second Circuit, these purported class actions would be subject to immediate dismissal, but if this Court affirmed the decision below, the other actions might well settle. Accordingly, this Court should grant the petition and hear the *Tasini* case on its merits in order to promote judicial economy and the expeditious resolution of these other actions.

ARGUMENT

Electronic collections of periodicals hold out great promise for the public. They encourage the widespread distribution of original works of authorship by allowing print publishers to make their newspapers, magazines, and other types of periodicals available to millions of individuals in an efficient and cost-effective manner. For example, libraries and public institutions can provide their users with complete copies of the most obscure journals without incurring the tremendous cost of shelving those publications. As a result, students, scholars, and other researchers (including this Court) can access collective works in a matter of seconds, instead of waiting for them to arrive from a storage facility or through an inter-library loan. More importantly, users can search the entire contents of works by using search engines to find exactly what they are looking for, without having to wade manually through voluminous irrelevant material. In this respect, electronic collections support the copyright law's constitutional mission of promoting the progress of science and the useful arts by encouraging the creation of and demand for original works of authorship.

The Second Circuit's overly restrictive interpretation of section 201(c) of the Copyright Act of 1976 undermines this constitutional objective. It requires the identification of each and every freelance writer whose work has been published in a periodical reproduced electronically, so that a license for the continued use of that material can be negotiated. It would be extremely difficult, if not impossible, to comply with this requirement. Most

print publishers and their licensees cannot locate individual contributors. As a result, a significant amount of material must be deleted from electronic copies of periodicals or those copies must be destroyed in their entirety in order to avoid liability for copyright infringement.

The newspapers, magazines, and other types of periodicals that are now available to the public electronically provide a daily record of American history. Unless this Court intervenes in this case, a significant portion of that historical record will be lost, but more importantly, the public would lose the ability to access that record in a convenient, comprehensive, and cost-effective manner. Therefore, the Second Circuit's decision not only threatens the public interest, it also undermines the copyright law's fundamental objective "to increase and not to impede the harvest of knowledge." *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 545 (1985).

Amicus submits this brief to inform the Court of an important factual development that has occurred since the petitioners filed their petition. As the petitioners have observed, organizations that represent freelance writers, such as the National Writers Union, have threatened to sue "[e]very single database provider" for copyright infringement unless they comply with the Second Circuit's decision. (Petitioner's Brief at 12-13.) Indeed, respondent Tasini has predicted that the decision will generate "a tidal wave of lawsuits." (Id. at 14.) Unfortunately, this prediction has come true.

Over the past eight weeks, three purported class actions have been filed in three separate jurisdictions on behalf of freelance writers nationwide.[2] Each action alleges copyright infringement as a result of the inclusion of the class members' contributions in collective works published on CD-roms and in other types of electronic copies without their permission. These actions raise precisely the same issues that the Second Circuit considered in *Tasini*, and therefore seek to enforce that decision as the legal standard for the entire nation. If this Court granted the petition for certiorari and reversed the Second Circuit's decision, however, these purported class actions would no longer be viable and would be subject to immediate dismissal. Likewise, if this Court affirmed the

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[2] The cases include *Authors Guild, Inc. v. Dialog Corp., Reed Elsevier, Inc., Dow Jones Reuters Business Interactive, LLC, Bell & Howell Co., Thomson Corp., Northern Light Technology, Inc., Ebsco Industries, Content Commerce LP,* and *Mediastream, Inc.*, Case No. 1:00CV6049 (S.D.N.Y., filed Aug. 15, 2000); *Laney v. Dow Jones & Co., Reed Elsevier, Inc., Northern Light Technology, Inc., Bell & Howell Co., Thomson Corp., West Publishing Corp., Gale Group, and Dialog Corp.*, Case No. 00CV769 (D. Del., filed Aug. 21, 2000); and *Posner, et al. v. Gale Group, Inc., Northern Light Technology Corp., Bell & Howell Information and Learning Co., Thomson Business Information, Reed Elsevier, Inc., West Publishing Corp., Dow Jones Reuters Business Interactive LLC, Mediastream, Inc., and Union Tribune Publishing Co.*, Case No. 00 Civ. 7376 (S.D.N.Y., filed Sept. 28, 2000). Counsel for plaintiffs in the *Laney* action has filed a motion to consolidate these cases under 28 U.S.C. § 1407.

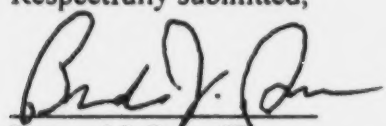
Second Circuit, the parties might well settle and those actions would be dismissed. Therefore, granting the writ and hearing the *Tasini* case on its merits would conserve judicial resources and promote the just, speedy, and inexpensive resolution of the claims alleged in those purported class actions.

Moreover, the *Tasini* case is the best vehicle for addressing the proper application and interpretation of 17 U.S.C. § 201(c). The parties include several freelance writers, print publishers, and electronic database providers that have compiled an extensive record addressing the same types of articles, collective works, and electronic databases that are at issue in each of the purported class actions. (Petitioners' Brief at 18.) By contrast, the newly filed actions do not have a broad selection of parties, because they involve freelance writers and electronic database providers, but only one print publisher. Furthermore, it would be several years before the record in those actions could be as fully developed as the record in *Tasini*, because each of them is still at the pleading stage.

CONCLUSION

Because the Second Circuit's decision threatens the public interest in obtaining access the historical record in an efficient and cost-effective manner, and because this Court's review of that decision would promote the public interest in judicial economy, the petition for certiorari should be granted.

Respectfully submitted,



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